WANDA LOIS LEE McKINNEY ET AL.

IBLA 80-512 Decided March 24, 1981

Appeals from decisions of the Nevada State Office, Bureau of Land Management, rejecting Indian allotment applications N-26337, etc.

Affirmed as to 13 applications; affirmed in part and appeals dismissed in part, with cases remanded to BLM, as to two applications.

1. Classification and Multiple Use Act of 1964 -- Indian Allotments on Public Domain: Lands Subject to -- Public Records -- Segregation

   Publication in the Federal Register of a classification for multiple use management pursuant to 43 CFR 2461.2 will segregate the affected land to the extent indicated in the notice, and applications for such land must be rejected.

2. Indian Allotments on Public Domain: Generally -- Rules of Practice: Appeals: Dismissal

   An appeal from a Bureau of Land Management decision suspending action on an Indian allotment application pending final action on a previously filed application for the same lands will be dismissed and the case remanded to BLM where the record shows that the previously filed application requesting the same land was, in fact, filed prior to appellant's application.

3. Applications and Entries: Generally -- Indian Allotments on Public Domain: Generally

Applications for Indian allotment on the public domain pursuant to sec. 4, General Allotment Act, as amended, 25 U.S.C. § 334 (1976), which are unaccompanied by the certificate of eligibility required by 43 CFR 2531.1 are properly rejected.

APPEARANCES: Each appellant named in the appendix, pro se.

OPINION BY ADMINISTRATIVE JUDGE LEWIS

The persons listed in the appendix hereto have appealed from decisions of the Nevada State Office, Bureau of Land Management (BLM), rejecting 15 applications filed for Indian allotments on public lands in Clark County, Nevada, pursuant to section 4, Act of February 8, 1887, as amended, 25 U.S.C. § 334 (1976). Because of the similarity of issues and the obvious relationship among the appellants, the Board, sua sponte, has consolidated the appeals for consideration.

The applications in question were filed with the Nevada State Office in September and October of 1979. On each application form, except N-26373, the applicants checked "no" in response to the question whether the land was occupied by the applicant or the minor child and whether there were improvements on the land. In N-26373 the applicant stated that the land was occupied and that there were improvements on it, namely a mobile home. In response to the question "Do you or the minor child claim a valid bona fide settlement," 11 applicants checked "yes," and 4 applicants (in N-26351, N-26371, N-26550, and N-26551) checked "no." With the exception of N-26373 none of the applicants gave any information as to the manner in which settlement was made as required by item 11 of the form. In N-26373, the applicant stated, "Placed mobile home on described land upon the public domain." Each referred to a posted notice, a copy of which was attached to the application.

All notices, except the one in N-26371, showed that they had been recorded in Clark County and listed a receiving number and book of recordation. The attached documents were the same in each case except for written insertions naming the applicant, and each asserts rights based upon various statutes relating to Indians and to their citizenship rights. Each applicant asserted that he or she is of Indian descent from either the Chickasaw, Cherokee, Choctaw, or Potawatomie Tribes.

BLM issued the same decision in all cases, except in N-25919, N-25920, N-26337, and N-26342, rejecting the applications because the lands requested in said applications lie within an area that has been

classified for retention in Federal ownership. BLM explained that the classification segregates the land from appropriation under the agricultural land laws, including the Act of February 8, 1887.

In N-26337 and N-26342 BLM rejected a portion of these applications because the lands (N 1/2 SE 1/4 and N 1/2 SW 1/4 of sec. 21, T. 18 S., R. 59 E.) have been classified for retention in Federal ownership. As for the remaining lands in these applications, BLM stated that according to its records, an Indian allotment application was filed on August 10, 1978, for the same lands requested in application N-26337 and on August 22, 1978, for the same lands requested in application N-26342. BLM said that these previously filed applications established a priority over applications N-26337 and N-26342; therefore, action on the remainder of these applications was suspended pending final action on the precedent applications.

BLM rejected the applications in N-25919 and N-25920 for the following reason:

> The regulations contained in 43 CFR 2531.1(d) state that ". . . The law only permits one eligible himself under the fourth section to take allotments thereunder on behalf of minor children or those to whom he stands in loco parentis . . . ."
>
> You are hereby allowed 30 days after receipt of this decision in which to submit documentation [sic] as to your eligibility to make application under the fourth section of the Act.
>
> If the required information is not received within the specified period, your application will be deemed rejected and the case will be closed without further notice to you.

All of the appeals, except N-25919 and N-25920, are similar and present the following argument: "The Agricultural Land Laws cannot supersede the Allotment claims of Indians. See Title 25 U.S.C. -- 334. See 43 C.F.R. 2212 part 3. [1/] See Choats v. Trapp 224 U.S. 413 (1912) [2/] See U.S.C.A. Const. Amend. 5."

In addition, appellants in N-26351 and N-26371 argue that Departmental regulations, classification, public laws, or agricultural land laws, etc., do not mean "appropriated" as Federal laws state (25 U.S.C.

1/ 43 CFR Subpart 2212 deals with miscellaneous state exchanges.

2/ We note that the Indian allotment case reported at 224 U.S. 413 is Heckman v. United States.

§ 334 (1976)). Therefore, they conclude that they cannot supersede the allotment claims of Indians. The applicant in N-26351 understands these laws to mean that any surveyed or unsurveyed lands of the United States, not otherwise appropriated, can be applied for and used for the benefit of the Indian.

In N-25919 and N-25920, the applicant appeals BLM's rejection of her applications (each filed on behalf of a minor daughter) for failure to file a certificate of eligibility. Her appeal reads in pertinent part:

> I filed these claims under Statute (332) & (334) of title 25 U.S. code and the Supreme law of the land written in the Constitution of the United States of America. Statue [sic] (345) and (346) gives me this right and I am eligible to make these applications as an Indian.

Statue [sic] 345 does not require me to belong to any tribe or acquire any certificates of Entitlements. I am a descendent of the Choctaw tribe.

We shall first consider the appeals from BLM's decisions rejecting the applications because the requested lands lie within an area that has been classified for retention in Federal ownership. Item 10 of the application form, after asking the applicant to indicate whether there was a claim of bona fide settlement, states: "Public land withdrawn by Executive Orders 6910 and 6964 of November 26, 1934, and February 5, 1935, respectively, is not subject to settlement under section 4 of the General Allotment Act of February 8, 1887, as amended until classified as suitable." 3/

3/ "First general order of withdrawal. Subject to the conditions expressed in the Act of June 25, 1910, (36 Stat. 847), as amended by the Act of August 24, 1912 (37 Stat. 497; 43 U.S.C. 141-143, 16 U.S.C. 471), it is ordered that all of the vacant, unreserved and unappropriated public land in the States of Arizona, California, Colorado, Idaho, Montana, Nevada, New Mexico, North Dakota, Oregon, South Dakota, Utah, and Wyoming be, and it hereby is, temporarily withdrawn from settlement, location, sale, or entry and reserved for classification, and pending determination of the most useful purpose to which such land may be put in consideration of the provisions of the Act of June 28, 1934 (48 Stat. 1269; 43 U.S.C. 315-315n, 1171), and for conservation and development of natural resources.

"The withdrawal hereby effected is subject to existing valid rights.

"This order shall continue in full force and effect unless and until revoked by the President or by act of Congress [Exec. Order No. 6910, Nov. 26, 1934]."

There is no information or credible evidence to show that any of the applicants have, in fact, physically settled upon the lands applied for, and particularly, that any alleged settlement was initiated prior to the first general order of withdrawal, Exec. Order No. 6910, November 26, 1934, supra. It is well established that no rights of Indians are violated by the withdrawal of public lands from settlement and the requirement that such lands be classified pursuant to section 7, Taylor Grazing Act, 43 U.S.C. § 315f (1976), before the public lands can be allotted to an Indian under section 4 of the General Allotment Act, supra. Pallin v. United States, 496 F.2d 27 (9th Cir. 1974); Hopkins v. United States, 414 F.2d 464 (9th Cir. 1969); Finch v. United States, 387 F.2d 13 (10th Cir. 1967), cert. denied, 390 U.S. 1012 (1968). Nor is there a violation of any rights of the Indian if an allotment application is denied where the land is not classified for allotment. Finch v. United States, supra.

Regulation 43 CFR 2530.0-3(c) provides that public land withdrawn by Exec. Order No. 6910, supra, and within a grazing district established under section 1 of the Taylor Grazing Act, 43 U.S.C. § 315 (1976), is not subject to settlement under section 4 of the General Allotment Act, supra, until such settlement has been authorized by classification. All public land in Clark County, Nevada, was placed in Nevada Grazing District No. 5, by Departmental order of November 3, 1936 (1 FR 1748 (Nov. 7, 1936)). 4/

All lands described in the 11 applications were classified for multiple use management, and the nature of the classification was published in 34 FR 14084-85 (Sept. 5, 1969). The notice states:

4/ "Order Establishing Grazing District No. 5 in the State of Nevada

November 3, 1936.

"Under and pursuant to the provisions of the Act of June 28, 1934, 48 Stat. 1269, as amended by the Act of June 26, 1936, Public, No. 827, 74th Congress, and subject to the limitations and conditions therein contained, Nevada Grazing District No. 5 is hereby established, the exterior boundaries of which shall include the following-described lands:

Nevada

Mount Diablo Meridian

"All of Clark County exclusive of Dixie National Forest and Fort Mohave and Moapa River Indian Reservations.

"Rules and regulations for the administration of grazing districts issued by the Secretary of the Interior March 21, 1936, shall be effective as to the lands embraced within this district from and after the date of the publication of this order in the Federal Register.

W. C. Mendenhall,
Acting Secretary of the Interior."

Notice of Classification of Public Lands for Multiple-Use Management

August 14, 1969.

1. Pursuant to the Act of September 19, 1964 (43 U.S.C. 1411-18) and to the regulations in 43 CFR Parts 2410 and 2411, the public lands within the area described below are hereby classified for multiple-use management. Publication of this notice has the effect of segregating the described lands from appropriation only under the agricultural land laws (43 U.S.C. Pts. 7 and 9; 25 U.S.C. sec. 334) and from sales under section 2455 of the Revised Statutes (43 U.S.C. 1171) and the lands shall remain open to all other applicable forms of appropriation, including the mining and mineral leasing laws, with the exception contained in paragraph 3. As used herein, "public lands" means any lands withdrawn or reserved by Executive Order No. 6910 of November 26, 1934, as amended, or within a grazing district established pursuant to the Act of June 28, 1934 (48 Stat. 1269, as amended), which are not otherwise withdrawn or reserved for Federal use or purpose.

The description of the segregated lands includes the lands requested by appellant.

Section 4 of the Act of February 8, 1887, supra, authorizes the Secretary of the Interior to issue allotments to Indians, in certain instances, where the Indians have made settlement upon public lands "not otherwise appropriated." Pamela June Wood Finch, 49 IBLA 325 (1980); Thurman Banks, 22 IBLA 205 (1975). In the present case the lands were "appropriated."

[1] Publication in the Federal Register of a notice of classification pursuant to the Classification and Multiple Use Act of 1964, 43 U.S.C. §§ 1411-1413 (1976), and the regulations in 43 CFR subparts 2410 and 2411, will segregate the affected land to the extent indicated in the notice. Robert Dale Marston, 51 IBLA 115 (1980); United States v. Rodgers, 32 IBLA 77 (1977). Publication in the Federal Register of a notice of a classification under the Classification and Multiple Use Act will segregate the lands described from other forms of disposal unless the classification provides specifically that the land shall remain open for certain forms of disposal. Robert Dale Marston, supra; H. E. Baldwin, 3 IBLA 71 (1971). The notice published September 5, 1969, segregated the lands described from disposal under the agricultural land laws, including 25 U.S.C. § 334 (1976).

With the exception of N-26373, the applicants do not show that they occupy the land or have placed improvements on it. The applicant

in N-26373 claims that she is occupying the land and states that she has placed a mobile home on the land. However, she gives no dates which would indicate when her occupancy began. There is no evidence that any of the applicants has made "settlement" as required by the Act prior to the time the lands were no longer available for entry. BLM correctly rejected these applications.

In N-26337 and N-26342, BLM also rejected the applications because a portion of the lands in question lies within an area that has been classified for retention in Federal ownership. We affirm those rejections as to such lands for the reasons given above.

[2] BLM stated that conflicting applications had been filed for the remaining portions of N-26337 and N-26342. The date stamp on Wanda Lois Lee McKinney's application in N-26337 reads September 28, 1979. A conflicting application, N-20390, was filed by Randy L. Fout on August 10, 1978. The date stamp on Paula Ford's application N-26342 is September 28, 1979. Timothy R. Fout filed application N-20445 for the same land requested by Paula Ford on August 22, 1978. It is clear from the date stamps on the application that Randy Fout's application was filed prior to Wanda McKinney's and that Timothy Fout's application was filed prior to Paula Ford's. BLM properly suspended the applications of McKinney and Ford pending final action on the conflicting applications. In light of this finding, the cases will be remanded to BLM to await final disposition of the conflicting applications. See 43 CFR 2531.3. Therefore, review of the merits of N-26337 and N-26342 as to the lands covered by the conflicting applications is not appropriate at this time and those parts of the appeals relating to such lands are dismissed. If BLM should render final decisions on these applications which are adverse to the interests of McKinney and Ford, they have the right to appeal to this Board.

[3] Finally, we shall consider the appeal from BLM's decisions rejecting Judy Woodworth's applications N-25919 and N-25920 for failure to submit a certificate of eligibility.

Regulation 43 CFR 2531.1, promulgated pursuant to the Allotment Act, defines the qualifications of applicants:

> § 2531.1 Qualifications of applicants.
>
> (a) General. An applicant for allotment under the fourth section of the act of February 8, 1887, as amended, is required to show that he is a recognized member of an Indian tribe or is entitled to be so recognized. Such qualifications may be shown by the laws and usages of the tribe. The mere fact, however, that an Indian is a descendant of one whose name was at one time borne upon the rolls and who

> was recognized as a member of the tribe does not of itself make such Indian a member of the tribe. The possession of Indian blood, not accompanied by tribal affiliation or relationship, does not entitle a person to an allotment on the public domain. Tribal membership, even though once existing and recognized, may be abandoned in respect to the benefits of the fourth section.
>
> (b) Certificate that applicant is Indian and eligible for allotment. Any person desiring to file application for an allotment of land on the public domain under this act must first obtain from the Commissioner of Indian Affairs a certificate showing that he or she is an Indian and eligible for such allotment, which certificate must be attached to the allotment application. Application for the certificate must be made on the proper form, and must contain information as to the applicant's identity, such as thumb print, age, sex, height, approximate weight, married or single, name of the Indian tribe in which membership is claimed, etc., sufficient to establish his or her identity with that of the applicant for allotment. Each certificate must bear a serial number, record thereof to be kept in the Indian Office. The required forms may be obtained as stated in § 2531.2(b).

In addition, 43 CFR 2531.1(d) states that "[t]he law only permits one eligible himself under the fourth section to take allotments thereunder on behalf of his minor children or of those to whom he stands in loco parentis."

Appellant did not submit the required certificate. Instead, in the application blank space specifically requesting the number of the certificate issued by the Bureau of Indian Affairs, appellant entered "8 U.S.C. § 1401 U.S.C.A. Const. Amend. 5." This response does not comport with the requirements. Neither the cited statute, which refers to United States citizenship, nor the United States Constitution is in issue here.

The applicant contends that the statute gives her the right to file these applications as an Indian. She asserts that the statute does not require her to belong to a tribe or file a certificate of eligibility. While the statute itself does not require the certificate of eligibility, Congress has entrusted the Department with the responsibility of administering and enforcing statutory provisions. To this end, regulations are promulgated which the Department is bound to follow. Such regulations have the force and effect of law. Vitarelli v. Seaton, 359 U.S. 535 (1959); Accardi v. Shaughnessy, 347 U.S. 260 (1954); Chapman v. Sheridan-Wyoming Coal Co., Inc., 338 U.S. 621, 629 (1950); Electronic Components Co. of N.C. v. N.L.R.B., 546 F.2d 1088

(4th Cir. 1976); McKay v. Wahlenmaier, 226 F.2d 35 (D.C. Cir. 1955); David v. Udy, 45 IBLA 389 (1980); Wilfred Plomis, 34 IBLA 222 (1978); Arizona Public Service Co., 20 IBLA 120 (1975). BLM properly rejected these applications because of the applicant's failure to comply with the regulations.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decisions appealed from are affirmed, with the exception of decisions in N-26337 and N-26342. The decisions in N-26337 and N-26342 are affirmed, in part. In regard to the portion of the decisions dealing with the conflicting applications, the appeals are dismissed and the cases remanded to the BLM office.

Anne Poindexter Lewis
Administrative Judge

We concur:

Bernard V. Parrette
Chief Administrative Judge

Bruce R. Harris
Administrative Judge

APPENDIX

N-26337 Wanda Lois Lee McKinney SE 1/4 sec. 21, T. 18 S., R. 59 E.

N-25919 Judy A. Woodworth for Gail Yvonne Woodworth, a minor child SW 1/4 sec. 25, T. 21 S., R. 59 E.

N-25920 Judy A. Woodworth for Kathy Jeanette Woodworth, a minor child NW 1/4 sec. 25, T. 21 S., R. 59 E.

N-26340 Bobby Olin Lee NE 1/4 sec. 21, T. 18 S. R. 59 E.

N-26342 Paul Gayle Lee Ford SW 1/4 sec. 21, T. 18 S. R. 59 E.

N-26351 Ronald Ray Bevill SE 1/4 sec. 24, T. 20 S., R. 64 E.

N-26371 John Dean Harrell for Rusty Gene Harrell, brother SE 1/4 sec. 19, T. 23 S., R. 62 E.

N-26373 Jackie Lavern Jarman NW 1/4 sec. 19, T. 19 S., R. 59 E.

N-26378 Jackie Lavern Jarman for Jeffrey Dean Jarman, a minor child NE 1/4 sec. 19, T. 19 S., R. 59 E.

N-26381 Jackie Lavern Jarman for Randall Coy Gifford, a minor child NE 1/4 sec. 27, T. 18 S., R. 59 E.

N-26550 Gary Keith Secondi for Shawndra Ann Secondi, a minor child NW 1/4 sec. 17, T. 18 S., R. 59 E.

N-26551 Gary Keith Secondi for Shanda Attika Secondi, a minor child SW 1/4 sec. 17, T. 18 S., R. 59 E.

N-26777 Jimmy Don Price for Todd Wayne Price, a minor child NE 1/4 sec. 30, T. 24 S., R. 61 E.

N-26778 Jimmy Don Price for Travis Glen Price, a minor child SE 1/4 sec. 30, T. 24 S., R. 61 E.

N-26781 Jimmy Don Price for Jimmie Dawn Price, a minor child NW 1/4 sec. 31, T. 24 S., R. 61 E.